STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN DUDLEY BROOKS,

Defendant-Appellant.

UNPUBLISHED
September 9, 2003

No. 237818
Oakland Circuit Court
LC No. 00-172211-FC

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

A jury convicted defendant of criminal sexual conduct in the first and third degrees.[1] The victim was vaginally penetrated resulting in injury and orally penetrated. Defendant claimed consent and challenges the dismissal of a 13th juror when the juror was stranded with car trouble, identification through a photographic lineup, the admission of a claimed involuntary statement, the effective assistance of counsel, the admission of photographic evidence depicting the car where the oral sex occurred, the admission of testimonial evidence concerning the victim's physical and mental distress, sufficiency of the evidence, instructional error concerning a missing witness, and the proportionality of concurrent sentences of 16 to 50 and 12 to 30 years' imprisonment respectively.

Because we find no abuse of discretion on the issues of dismissal of the 13th juror, the admission of testimonial and photographic evidence, denial of a missing witness instruction, or sentencing within the prescribed guideline ranges, the claims of error fail. Unpreserved issues concerning the identification process and defendant's statement fail for want of plain error affecting substantial rights that are outcome determinative. The failure of counsel to preserve the identification and statement issues does not constitute ineffective assistance of counsel because the positions taken by counsel were strategic and consistent with the theory of defense. And the challenge to the sufficiency of the evidence fails because the credibility of witnesses is an issue for the jury together with the evidence presented as opposed to assertions of evidence not presented. We affirm.

[1] MCL 750.520b(1)(f) and MCL 750.520d(1)(b) respectively.

I. Facts

This case arises from an incident that took place on the night of March 31 and April 1, 2000, beginning in Detroit and concluding in Madison Heights. The complaining witness testified that she had been drinking heavily at a club with her boyfriend, the two started arguing on the way home, and the complainant asked and was let out of the vehicle. After the complainant wandered the streets without finding a way home, defendant approached in his car and offered to assist her. Once she was in defendant's car he drove to a secluded area and physically forced her to perform oral sex on him. The complainant testified that she was allowed leave the vehicle to urinate near a dumpster. But defendant grabbed her and forcibly penetrated her with his penis.

Defendant was charged and convicted of first- and third-degree criminal sexual conduct. The trial court denied defendant's motion for new trial. This appeal followed.

II. Dismissal of a Juror

On the second day of trial, the trial court announced that car trouble had stranded one of the jurors, and that the juror would accordingly be dismissed. The court elaborated, "[t]hat is the reason we select 13 jurors. He, in essence, is self-excluding him[self]." Defense counsel objected on the ground that the juror was only five or ten minutes away, to which the court replied, "I'd have to get a Sheriff, I'd have to get a car, they'd have to go pick him up, find him, and then we'd have to turn around and get him back here, transport him. That's an hour. I've been this route." The court added, "he could be the 13th juror picked by draw. God has picked him by draw right now."

A trial court's decision to excuse a juror in the course of trial is reviewed for an abuse of discretion.[2] An abuse of discretion occurs only when a court's action is "so violative of fact and logic as to constitute perversity of will or defiance of judgment."[3] MCL 768.18 provides that "[s]hould any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors . . . , he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12." The removal of the one juror resulted in a jury of twelve members. Defendant's protest to the exclusion of a 13th juror simply consisted of an observation that the stranded juror was not far away. There was no prejudice to defendant, and no abuse of discretion.

III. Admission of Testimonial and Photographic Evidence

Defendant challenges the propriety of the complainant's testimony regarding how long she bled after the incident in question, her concern over her daughters, her relationship with her boyfriend after the incident, and the photographic evidence of the inside of defendant's car.

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[2] *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

[3] *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996) (internal quotation marks and citation omitted).

The prosecution's theory of first-degree criminal sexual conduct required personal injury to the victim as one of the elements of the crime. Because the extent of the complainant's bleeding after the incident with defendant bore directly on this element, the trial court properly overruled defendant's objection to that testimony. Defendant's alternative theories to explain the blood, namely an unrelated assault or menstruation, were for the jury to consider. "It is the province of the jury to determine questions of fact and assess the credibility of witnesses."[4]

Sufficient mental anguish will meet the personal injury element requirement of the crime.[5] Testimony by complainant that she suffered heightened fear since the assault that something like her assault could happen to her two daughters was relevant to the degree of her mental anguish. The complainant's account of how the incident left her feeling "dirty," and not wanting her boyfriend to touch her, shed further light on her resulting mental anguish. The trial court properly overruled the objection to the mental anguish testimony.

Defendant objected to admission of the photographs of the inside of his car on the ground that the photographs were not taken until after the car had been impounded eleven days after the incident. Defendant asserts that the photographs are irrelevant by virtue of the delay. Because the delay and the possibility of non-representative photographs were fully explored at trial, the trial court correctly reasoned that these concerns went to weight, and not admissibility. A jury is entitled to learn the "'complete story'" of the matter in issue.[6] There was no abuse of discretion.

IV. Instruction Concerning Missing Witness

Defendant argues because the prosecution failed in its duty to produce as a witness the gas station attendant from whom defendant bought cigarettes after picking up the complainant, but before the incident, that the trial court was obligated to provide an instruction from which the jury may infer that the testimony of the missing witness would have been unfavorable to the prosecution.[7] The failure to instruct is reviewed for an abuse of discretion.[8]

Defendant implies that the gas station attendant was a potentially important, or res gestae,[9] witness. The Supreme Court has stated, "[t]he prosecutor's [former] duty to produce res gestae witnesses has been replaced with an obligation to provide notice of known witnesses and

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[4] *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

[5] *People v Petrella*, 424 Mich 221, 259; 380 NW2d 11 (1985); *People v Himmelein*, 177 Mich App 365, 376-377; 442 NW2d 667 (1989).

[6] *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

[7] CJI2d 5.12.

[8] *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

[9] A res gestae witness is "[a]n eyewitness to some event in the continuum of the criminal transaction and one whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense." Black's Law Dictionary (6th ed, 1990), p 1305, citing *People v Baskin*, 145 Mich App 526, 530-531; 378 NW2d 535 (1985).

reasonable assistance to locate witnesses on defendant's request."[10] Defendant does not suggest, and the record does not show, that the defense exercised the statutory option for assistance from the prosecution in locating this witness within the requisite ten days before trial.[11] We question the witness characterization as res gestae as there is no suggestion that the attendant actually observed the charged conduct. At best, the witness may have offered some perspective on the deportment of the defendant and the victim in the midst of their time together. It is far from obvious that any testimony from the attendant would have been helpful to either side.

We do not take issue with the trial court's conclusion that the prosecutor tried in good faith to produce the witness. Although the gas station attendant was not interviewed by the police officer, he clarified that this was because efforts to find him were unsuccessful. Neither the gas station manager, nor motel personnel where the attendant had resided could assist in his location. So the inability to locate the witness persisted in frustration of attempts to serve subpoenas on him. We do not find an abuse of discretion by the trial court in its refusal to provide a missing witness/negative inference instruction.

V. Sentence

Defendant argues that his minimum sentence of sixteen years' imprisonment for first-degree criminal sexual conduct is disproportionately harsh, citing *Milbourn.*[12] General proportionality review pursuant to *Milbourn* and related authorities is not appropriate where a minimum sentence falls within the range recommended by the legislative sentencing guidelines.[13] "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence."[14]. Because defendant's minimum sentence falls within the range recommended by the legislative guidelines and because defendant affirmatively declined at sentencing to challenge the scoring of any of the variables or information on which the court relied in establishing that range, no abuse of discretion occurred and we are obligated to affirm the sentence.[15]

VI. Identification

Defendant argues that the trial court erred in allowing a police officer to testify that the complainant had identified defendant in a photographic lineup. The decision to admit evidence

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[10] *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995).

[11] MCL 767.40a(5).

[12] *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

[13] *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001); see also *People v Babcock* ___ Mich ___; ___ NW2d ___ (2003), slip op at 7-8.

[14] MCL 769.34(10); *Babcock, supra*, slip op at 14 n 18.

[15] *Id.; People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

is within the trial court's discretion and is reviewed on appeal for an abuse of discretion.[16] Because there was no objection at trial to any of the identification procedures employed, a defendant pressing an unpreserved issue must show plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.[17]

There is no plain error in this instance. Defendant asserts, without citation to the record, that once the Defendant-Appellant was in custody, the police should have conducted a proper corporeal lineup, unless a live lineup was not possible. Despite defendant's assertion that he was in custody at the time of the photographic lineup, the police officer who conducted the lineup testified that it took place on April 10, 2000, and that defendant was arrested by a different police department on April 12, 2000, two days later. Defendant otherwise merely speculates that the pictures presented to the complaining witness may have been suggestive and protests a failure of corroboration concerning the selection of the defendant from the photographic array. Mere speculation will not support appellate relief and no authority for the proposition that a police officer's description of an identification procedure cannot stand absent independent corroboration.

Defendant's substantial rights were unaffected by any real or imagined flaw in the identification process. The defense proceeded on the theory of consent, openly conceding that defendant was the person with whom the complainant interacted on the night in question. Identification is only challenged on appeal in a technical sense and therefore, we reject this claim of error.

VII. Defendant's Statements

Defendant asserts that when the police apprehended him, they denied his repeated requests for a lawyer, his need for medical attention, and while he was in a state of physical and mental distress, resorted to physical threats to extract purely involuntary statements from defendant. It is axiomatic that suppression of defendant's statements is required upon established facts of improper police conduct as accused on appeal.[18]

The record does not support the factual accusations of improper police conduct and defendant fails to show precisely how anything defendant said to the police in fact worked against him at trial. The record suggests defendant provided his statement to the police after being advised of and waiving his *Miranda*[19] rights. In the absence of indications in the record that any police misconduct was involved in obtaining defendant's statements, or that he was in fact at that moment lacking in mental competency, we decline to allow defendant on appeal to raise issues that should have been raised and resolved below in a proper pretrial suppression

[16] *People v Bahoda*, 448 Mich 261, 288-289; 531 NW2d 659 (1995).

[17] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[18] *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999).

[19] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

hearing.[20] Certainly there was no plain error at trial from the trial court's failure to sua sponte question the propriety of admitting defendant's statements to the police.

We regard defendant's statements as more ambivalent than inculpatory. Although defendant told the officer that the complainant performed oral sex on him "[b]ut she didn't want to," defendant's written account of that act included the milder disclaimer, "but not as if she wanted to excite me." The written account then included the following: "I then said, 'How about some pussy?' She said, 'Let me pee.' Afterwards she grinded. We had sex outside the car. She shit on me. So I left. She wanted to get back in. I asked her to get out and I left."

Defendant's statements considered as a whole, described a woman engaging in sexual activity with indifference, not under duress. Defendant's substantial rights were thus not affected. Because defendant fails to show plain error in this matter, or that his statements affected the result, this claim of error must fail.

VIII. Assistance of Counsel

Defendant grafts onto his arguments concerning the photographic identification, and his statements to the police, the assertion that trial counsel was ineffective for failure to preserve those issues. We disagree.

The federal and state constitutions guarantee a criminal defendant the right to the assistance of counsel.[21] The constitutional right to counsel is a right to the *effective* assistance of counsel.[22] To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms.[23] Defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable.[24]

A defendant pressing a claim of ineffective assistance of counsel must overcome a strong presumption that counsel's tactics were matters of sound trial strategy.[25] This Court will not assess counsel's competence with the benefit of hindsight.[26] Because defendant did not move for

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[20] *Abraham, supra*.

[21] US Const, Ams VI and XIV; Const 1963, art 1, § 20.

[22] *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996).

[23] *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

[24] *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

[25] *People v Toma*, 462 Mich 281, 308; 613 NW2d 694 (2000); *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

[26] *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

a new trial or a *Ginther*[27] hearing below, our review of this claim is limited to mistakes apparent on the record.[28]

Concerning the identification of defendant as the culprit, it was obviously sound strategy for defense counsel to argue consent, not mistaken identity. The Court stated in *People v Julian*,[29] that counsel's decisions concerning the theories to present are presumed to be exercises of sound trial strategy. Counsel thus had nothing to gain from challenging the procedures used to identify defendant as the person who interacted with the complainant.

Concerning defendant's statements, the evidence that defendant calmly waived his *Miranda* rights and cooperated with the police suggests that had defense counsel moved to suppress defendant's statements, the motion would have failed. Counsel is not obliged to argue futile motions.[30] As a matter of strategy, counsel may well have preferred to have defendant's statements come into evidence in that they could reasonably be characterized as describing an occasion that did not involve force, threats, or injury.[31]

For these reasons, defendant's claim of ineffective assistance must fail.

IX. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence to support his convictions. When reviewing the sufficiency of evidence in a criminal case, a reviewing court must view the evidence of record in the light most favorable to the prosecution to determine if a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt.[32]

Defendant's sufficiency challenge concerning his convictions urges this Court to credit that body of evidence that tended to exonerate defendant to the exclusion of all other evidence. Defendant asserts that the complainant's testimony was "highly incredible," emphasizes that she was intoxicated at the time, and that medical personnel were unable to determine if a sexual assault had occurred.

"Credibility is a matter for the trier of fact to ascertain. We will not resolve it anew."[33] A single witness' account can suffice to persuade a jury of a defendant's guilt beyond a reasonable doubt.[34] The complainant's plain testimony that defendant physically forced her to

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[27] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[28] *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

[29] *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988).

[30] *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

[31] *Julian, supra*.

[32] *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

[33] *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

[34] See *People v Jelks*, 33 Mich App 425, 432; 190 NW2d 291 (1971).

perform oral sex, and that she was injured when defendant forcibly penetrated her vagina is sufficient to support the convictions.[35]

Defendant protests that his car was not tested for the complainant's fingerprints or hair, and the condom was not tested to determine the source of its body fluids. We find the lack of testing constitutes no evidentiary deficiency because the defense conceded physical interaction between defendant and the complainant. The question of sufficient evidence is a function of what was presented, and not of what was not presented.[36]

For these reasons, we reject this claim of error.

Affirmed.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Pat M. Donofrio

[35] MCL 750.520b(1)(f); MCL 750.520d(1)(b).

[36] *People v Hardiman*, 466 Mich 417, 424; 646 NW2d 158 (2002).